No.83-990

IN THE

Supreme Court of the United States

October Term, 1983

THE SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS; PHILLIP RUNKEL, Superintendent of Public Instruction of the State of Michigan; STATE BOARD OF EDUCATION OF THE STATE OF MICHIGAN; LOREN E. MONROE, State Treasurer of the State of Michigan; IRMA GARCIA-AGUILAR and SIMON AGUILAR, BRUCE and LINDA BYLSMA, ROBERT and PENELOPE COMER, CLARENCE and ROSALEE COVERT, SCIPUO and JANICE FLOWERS, JOHN and SHIRLEY LEETSMA,
Petitioners,

v.

PHYLLIS BALL; KATHERINE PIEPER: GILBERT DAVIS; PATRICIA DAVIS; FREDERICK L. SCHWASS and WALTER BERGMAN,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
for the Sixth Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

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Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through the enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the Constitution of the United States.

Americans United has a membership of some 40 thousand members of various religious beliefs and some of no religious belief in all states of the United States, including the State of Michigan. Americans United is involved in extensive litigation of First Amendment free exercise and establishment issues throughout the United States.

Americans United for Separation of Church and State has been involved in almost every major case coming before this Court dealing with the question of the Establishment Clause of the First Amendemnt to the United States Constitution, including such cases as *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); and *Meek* v. *Pittenger*, 421 U.S. 349 (1975).

Americans United is particularly interested in the issues raised in this case because the decision in this case may directly affect two cases in which Americans United is currently involved. Those cases are *Wamble* v. *Bell*, United States District Court, Western District of Missouri, Western Division, Civil Action No. 77-0254-CV-W-8, which is presently awaiting a decision on the merits; and *Barnes* v. *Bell*, United States District Court for the Western District of Kentucky at Louisville, Civil Action No. C-80-0501-L(B). Both of these cases involve challenges under the Establishment Clause of the First Amendment to Title I of the Elementary and Secondary Education Act of 1965.

Americans United agrees with the position expressed in the brief for the United States as *amicus curiae* that this case does not itself involve any program funded under Title I but that "this case will unavoidably carry implications for judicial treatment of pending Title I suits." (Amicus Brief for the United States, p. 27).

Because there are pending cases under Title I, ESEA, the Court should carefully limit its ruling in this case and leave to another day those independent issues presented in cases where "the First Amendment implications may vary [from this case] according to the precise contours of the plan that is formulated" under Title I. *Wheeler* v. *Barrera*, 417 U.S. 402, 426 (1974).

Americans United also has a particular interest in the question of standing as raised by petitioners by reason of its participation in *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982). In the event individual state taxpayers are not permitted to challenge unconstitutional acts under the Establishment Clause committed by state government and their agencies, the Establishment Clause will soon become meaningless.

Americans United was also a plaintiff in the instant action but was dismissed as a party plaintiff on August 16, 1982, (J.A. 37).

Americans United will contend in this brief that the individual respondents, as state and local taxpayers, have standing, notwithstanding *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), but also have standing under the reasoning of *Flast* v. *Cohen*, 392 U.S. 83 (1968). It will also contend that the providing of educational services by public school teachers on the premises of church-operated schools is unconstitutional under this Court's holding in *Meek* v. *Pittenger*, 421 U.S. 349 (1975).

SUMMARY OF ARGUMENT

Respondents are state and school district taxpayers asserting that actions of state government and its instru-

mentalities have violated the Establishment Clause of the First Amendment. Under the prior decisions of this Court, local taxpayers have standing to bring an action if the challenge goes to spending. The restrictions enunciated in *Frothingham* v. *Mellon, supra,* and the holding of this Court in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, supra,* are therefore not relevant.

Even if an action brought by state or local taxpayers against a state or local school district program is governed by the same rules as a federal taxpayer action, these respondents still meet the standing requirements as set forth in *Flast* v. *Cohen, supra.*

The "shared time" program challenged herein must be found unconstitutional if the principles set forth in *Meek* v. *Pittenger, supra,* are faithfully applied. This Court has invalidated similar programs where teachers paid by tax funds provide educational services on the premises of sectarian schools.

ARGUMENT

I.

RESPONDENTS, WHO ARE STATE AND SCHOOL DISTRICT TAXPAYERS, HAVE STANDING TO CHALLENGE THE ACTIONS OF STATE GOVERNMENT AND THEIR AGENCIES UNDER THE ESTABLISHMENT CLAUSE.

Petitioners contend that respondents do not have standing to bring this action predicating their contention on this Court's determination in *Flast* v. *Cohen,* 392 U.S. 83 (1968), and *Valley Forge Christian College* v. *Americans United for Separation of Church and State,* 454 U.S. 464

(1982). The simple answer is that neither *Flast* nor *Valley Forge* is controlling.

The respondents alleged in the complaint, and corroborated by affidavits received as part of the record, that they are citizens of the United States and residents of the Grand Rapids School District who pay federal, state, and local taxes, and that they object on the basis of the Establishment Clause to the use of their state, and local taxes to support the programs challenged in this case.

Unlike the plaintiffs in *Flast* and *Valley Forge,* this is not an action based upon federal taxpayer status seeking to invalidate a federal statute. The decision in *Flast* v. *Cohen, supra,* addressed the standing issue as a result of the Court's prior decision in *Frothingham* v. *Mellon,* 262 U.S. 447 (1923). In *Frothingham* the Court, for the first time, "ruled that a *federal taxpayer* is without standing to challenge the constitutionality of a *federal statute.*" *Flast* v. *Cohen, supra* at 85 (emphasis supplied). This Court in *Valley Forge* acknowledged that the ruling in *Flast* is an "exception to the *Frothingham* principle," *Valley Forge Christian College* v. *Americans United, supra* at 481.

It is clear that the *Frothingham* limitation applies only to federal taxpayers challenging a federal statute. The Court in *Frothingham* specifically noted "the interest of a taxpayer of a municipality in the application of its moneys is direct and immediate, and the remedy by injunction to present the misuse is not inappropriate. It is upheld by a large number of state cases *and is the rule of this Court.*" *Frothingham* v. *Mellon, supra* at 486.

Justice Brennan, in his dissenting opinion in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, supra* at 495, noted that "[t]he

Court conceded that it had historically treated the interest of a *municipal* taxpayer in the application of the municipality's funds as sufficiently direct and immediate to warrant injunctive relief to prevent misuse." See also Davis, "Standing to Challenge Governmental Action," 39 Minn. L. Rev. 353, 386-391 (1955); "Standing: *Taxpayers and Others,* 35 U. Chi. L. Rev. 601, 610-611 (1968).

In *Bradfield* v. *Roberts,* 175 U.S. 291 (1899), this Court passed upon the merits of the constitutional question raised by "a citizen and taxpayer of the United States and a resident of the District of Columbia." The suit purposed to enjoin the Treasurer of the United States from making a disbursement to a District of Columbia hospital, and argued that the legislation authorizing the disbursement was unconstitutional. The defendant demurred in the lower court on the ground that the complaint had shown no right to maintain the bill. This Court, however, decided the merits of the constitutional issue. Justice Brennan, in *Valley Forge,* noted that "the Court permitted a federal taxpayer to present an Establishment Clause challenge to the use of federal money for the construction of hospital buildings in the District of Columbia . . . because it was appropriate to treat the District of Columbia as a municipality." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, supra* at 495.

Subsequent to the Court's decision in *Frothingham,* this Court in *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370 (1930), affirmed the decision of the Louisiana Supreme Court which had in turn affirmed the judgment of the state trial court refusing to grant an injunction at the request of "citizens and tax-payers of the State of Louisiana." In *Cochran* plaintiffs sought to restrain the state board of education and other state officials from ex-

panding any part of the severance tax fund in purchasing school books. This action was not based upon the First Amendment, but rather was brought under the Fourteenth Amendment claiming that the furnishing of textbooks "to aid private, religious, sectarian, and other schools not embraced in the public educational system of the state," constituted a taking of private property for a private purpose. The court reviewed the appeal on the merits unconcerned about any standing question.

In *Everson* v. *Board of Education,* 330 U.S. 1 (1947), this Court had the opportunity to apply the *Frothingham* stricture to a case where the plaintiffs claimed standing by reason of their district taxpayers' status. The suit was filed in state court and challenged the right of the local board of education to reimburse parents of parochial school students for bus transportation expenses incurred in sending their children to parochial schools.

This Court, however, reached the establishment issue without concern for the plaintiffs' standing. It did so without any inquiry into the extent of the taxpayers' interests, yet this Court said later that *Everson* had suffered "a direct dollar-and-cent injury." *Doremus* v. *Board of Education,* 342 U.S. 429, 434 (1952). As stated by Justice Jackson "in the *Everson case* there was a direct, substantial and measurable burden on the complainant as a taxpayer to raise funds that were used to subsidize transportation to parochial schools. Hence, we had jurisdiction to examine the constitutionality of the levy and protect against it if a majority had agreed that the subsidy for transportation was unconstitutional." *McCollum* v. *Board of Education,* 333 U.S. 203, 233 (1948) (Jackson, J., concurring).

Conversely, in *Doremus* v. *Board of Education, supra,* three years after its decision in *Everson,* this Court

dismissed the appeal for lack of standing. In *Doremus,* the taxpayers sought to challenge Bible reading in New Jersey schools, and the Court held that they lacked standing. The difference, according to the *Doremus* opinion, was:

> Because our own jurisdiction is cast in terms of "case or controversy," we cannot accept as the basis for review, nor is the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.
>
> The taxpayer's action can meet this test, but only when it is a good-faith pocketbook action. It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference. If appellants establish the requisite special injury necessary to a taxpayer's case or controversy, it would not matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct.

Id. at 434-35.

As Professor Davis noted "[s]o a state taxpayer, according to the Supreme Court in *Everson* and *Doremus,* has standing to challenge a spending program but not a Bible-reading program not involving spending. The test is whether the taxpayer's action is 'a good-faith pocketbook action,' and the test is met when the challenge goes to spending, for then the taxpayer sustains 'a direct dollars-and-cents injury.'" Davis, "Standing: Taxpayers and Others," *supra* at 611.

Petitioners contend that respondents were not injured because, in the trial on the merits, respondents did not quantify the extent of their injury. Under the holding of *Flast,* plaintiffs are not required to quantify the extent of the injury.

As Justice Harlan noted in his dissent in *Flast:*

> The complaint in this case, unlike that in *Frothingham,* contains no allegation that the contested expenditures will in any fashion affect the amount of these taxpayers' own existing or foreseeable tax obligations. Even in cases in which such an allegation is made, the suit cannot result in an adjudication either of the plaintiff's tax liabilities or of the propriety of any particular level of taxation. The relief available to such a plaintiff consists entirely of the vindication of rights held in common by all citizens. It is thus scarcely surprising that few of the state courts that permit such suits require proof either that the challenged expenditure is consequential an amount or that it is likely to affect significantly the plaintiff's own tax bills; these courts have at least impliedly recognized that such allegations are surplusage, useful only to preserve the form of an obvious fiction.

Flast v. *Cohen, supra* at 118 (Harlan, J. dissenting).

Nowhere in the *Flast* opinion is there any attempt to quantify the dollar-and-cent injury suffered by plaintiffs in that case.

It is noteworthy that petitioners failed to file a summary judgment motion contesting respondents' standing. If respondent's allegations of injury were in fact untrue, then the petitioners "should have moved for summary judg-

ment on the standing issue and demonstrated to the district court that the allegations were a sham and raised no genuine issue of fact." *United States* v. *SCRAP,* 412 U.S. 669, 690 (1973).

In paragraph 25 of their complaint respondents claim that the acts and threatened acts of the defendants required them "to pay taxes for the support of religion and religious schools, to aid with public funds religion and the establishment of religion, and to give financial aid to the teaching and dissemination of religious doctrines and beliefs." (J.A. 8-9).

The allegations contained in respondents' complaint therefore are almost identical to the allegations contained in the *Flast* complaint which this Court determined was adequate to confer standing. "The gravamen of the appellants' complaint [in *Flast*] was that federal funds appropriated under the Act were being used to finance instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks and other instructional materials for use in such schools. Such expenditures were alleged to be in contravention of the Establishment and Free Exercise Clauses of the First Amendment." *Flast* v. *Cohen, supra* at 85-86.

Thus, even if the *Frothingham* restriction for federal taxpayers' actions apply to a state or school district taxpayers' complaint, respondents are within the *Flast* exception to *Frothingham.*

There is no discernible distinction between the claim filed by respondents in the instant action and the plaintiffs in *Flast.* In *Flast* appellants filed suit in the United States District Court for the Southern District of New York "to enjoin the allegedly unconstitutional expenditure of federal funds under Titles I and II of the Elementary and Secondary Education Act of 1965 . . . . The complaint alleged that the seven appellants had as a common attribute that 'each pay[s] income taxes of the United States,' and it is clear from the complaint that the appellants were resting their standing to maintain the action solely on their status as federal taxpayers. The appellees, who are charged by Congress with administering the Elementary and Secondary Education Act of 1965, were used in their official capacities." *Id.* at 85.

Clearly, this Court found injury in fact in *Flast* not by reason of any proven quantification of his dollar-and-cent injury, for such a determination is completely absent from the opinion in *Flast.* What is apparent is that the Court therein determined that plaintiffs had standing because the plaintiffs had "'alleged such a personal stake in the outcome of the controversy as to assure concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Id.* at 99.

One commentator, in computing the possible dollar-and-cent injury in *Flast,* determined that one who pays federal taxes of $1,000 would have been hurt to the extent of approximately $.12 by the alleged illegality of the program under attack there. See Davis, "Standing: Taxpayers and Others," *supra* at 611.

However, we do not know whether any of the plaintiffs in *Flast* suffered even to that extent. Other cases decided by this Court illustrate that the claimed injury need not be substantial. In *McGowan* v. *Maryland,* 366 U.S. 420 (1961), each party's stake was a fine of $5.00 in costs. In *Baker* v. *Carr,* 396 U.S. 186 (1962), a formal stake was a

fraction of one vote. In *Harper* v. *Virginia Board of Education,* 383 U.S. 663 (1966), plaintiff's interest was a poll tax of $1.50.

In this case respondents have alleged two levels of taxpayer injury – as state taxpayers and as school district taxpayers.

The Shared Time and before and after Community Education classes involving parochial school students resulted in state aid payments to the Grand Rapids Public School District of approximately $6 million in fiscal 1981-82. This is $6 million of state funds which would otherwise not have been spent.

As school district taxpayers, the Grand Rapids public schools appropriate approximately $200,000 per year to the parochial schools in order to "lease" the space for the administration of the program to benefit parochial school students on the premises of the parochial schools. (J.A. 426-427). The amount is computed on the basis of $10 per class per week in secondary schools and $6 per class per week in elementary schools. The total cost of the program as operated in the school year 1981-82 was about $3 million. According to interrogatories answered by an officer of the Grand Rapids School District, the district received its operating funds for 1979-80 from the following sources: local revenue - 39.8%; state revenue - 51.9%; tuition - 5.1%; interest - 2.5%; other revenue - .7%. The state's portion has been diminishing in the past few years, especially that part which comes from the general fund contribution to education (J.A. 289). This contribution is part of the state budget and must be annually appropriated by the legislature.

Petitioners make the claim that the local district actually received more state funds for every part-time public school

student than was necessary to conduct the programs at issue (74a n.6 (J.A. ¶238) 354) and thus the difference eased the overall burden of the local taxpayer. Nevertheless, to the extent that local and state tax funds were spent to provide services for parochial school students on the premises of the parochial schools, tax funds were used.

Petitioners contend that the action challenged by respondents is not an exercise of taxing and spending power by the Michigan legislature but a decision by local authorities to implement the programs at issue by the use of the funds made available by the state legislature (Joint Brief of Petitioners, p. 46).

Paragraph 10 of respondents' complaint (J.A. 5) alleges that the school district is a subdivision of the government of the State of Michigan deriving its funds from the taxpayers. Paragraph 19 of the complaint (J.A. 7) states that the superintendent of public instruction of the State of Michigan and State Board of Education have approved said

> shared time for purposes of receiving State taxpayer aid. Likewise, defendant Loren E. Monroe has paid state tax funds to defendant school district for said program. Unless enjoined from so doing, said defendant will continue to authorize payment of tax funds, and will pay same, to defendant school district for said program which is in violation of the Establishment Clause of the First Amendment.

(J.A. 7, ¶19).

Paragraph 20 (J.A. 20) alleges that the funds from which state school aid is derived are general tax revenue of the State of Michigan, including income taxes and sales

taxes paid by the individual plaintiffs and others similarly situated. In the answer filed by the Superintendent of Public Instruction, State Board of Education, and the State Treasurer, it was admitted that the allegations contained in paragraph 10 were true (J.A. 10). Petitioners also admitted that the allegations contained in paragraph 19 of the complaint were correct and further asserted that they have a duty to approve and make the payments of state aid funds to the defendant school district for public school pupils in part-time attendance in public school premises leased by the school district from nonpublic schools. They also admit the allegations contained in paragraph 20 (J.A. 21).

Under Article X, §17 of the Michigan Constitution of 1963, "no money shall be paid out of the State Treasury except in pursuance of appropriations made by law." Petitioners imply that once the state aid is paid out, the state's involvement in the alleged unconstitutional action is at an end. In essence, petitioners suggest that a bifurcation of the appropriation from the spending aspect should deny respondents' standing. Under petitioners' theory, apparently if the state made both the appropriation and the spending determination, respondents would have standing under *Flast*. Petitioners, however, misconceive the responsibilities of the state, the knowledge of the state officials, and the relationship of the school district to the state defendants.

The status of school districts under Michigan law is set forth in *Bradley* v. *Milliken,* 484 F.2d 215, 245-249 (6th Cir. 1973). There, the court noted:

> As held by the district court, it is well established under the Constitution and laws of Michigan that the public school system is a state function

> and that local school districts are instrumentalities of the state created for administrative convenience.

Id. at 245.

The legislature has entire control over the schools of the state subject only to the provisions of the Constitution. *Child Welfare Society of Flint* v. *Kennedy School District,* 220 Mich. 290 (1922). It is state policy to retain control of its school system to be administered throughout the state under state laws by local state agencies organized with plenary powers to carry out delegated functions given it by the legislature. *School District of the City of Lansing* v. *State Board of Education,* 367 Mich. 591 (1962). Even though the power of daily administration of public schools has been delegated to officials with less than statewide jurisdiction, this does not relieve the state officials of their obligation to use their authority in accordance with the Constitution. *Bradley* v. *Milliken,* 338 F.Supp. 582, 593-594 (E.D. Mich. 1971).

The State Board of Education has superintending control over local boards of education and superintending control over all education, elementary and secondary. *Oliver* v. *Kalamazoo Board of Education,* 346 F.Supp. 766, 778 (W.D. Mich. 1972). As the court stated in *Oliver,* citing the court in *Davis* v. *School District of Pontiac,* 309 F.Supp. 734, 741-742 (E.D. Mich. 1970) "when the power to act is available, failure to take the necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of affirmative steps to advance such situation. Sins of omission can be as serious as sins of commission."

Clearly, the state department of education was aware of the fact that when they transmitted moneys to the school

district of the City of Grand Rapids, the payment of state aid funds to the school district would be used to provide services to parochial school students on the premises of parochial schools and that the Michigan statute does not prohibit such expenditure (1976 P.A. 451 §1282; MCLA 380.1282; MSA 15.41282). See paragraph 19 of petitioners' answer (J.A. 29, ¶19) and excerpts from Robert Hornberger of the Michigan Department of Education (J.A. 152-153, ¶2).

Under the Establishment Clause of the First Amendment, in order for funds or services granted by the state not to have the impermissible effect of advancing religion, the state must ensure that the effects of such grant will not permit its being put to religious use. The state also has the continuing responsibility to ascertain that the state aid is not subsequently put to religious use. *Americans United for Separation of Church and State* v. *Oakey,* 339 F.Supp. 545, 549 (D. Vt. 1972). See also *Tilton* v. *Richardson,* 403 U.S. 672 (1971); *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971).

The above indicates that the taxing and spending allegations of the respondents here are no different than those contained in the *Flast* complaint. In *Flast,* the defendants are those "charged by Congress with administering the Elementary and Secondary Education Act of 1965." *Flast, supra* at 85. This Court noted in *Flast:*

> While disclaiming any intent to challenge as unconstitutional all programs under Title I of the Act, the complaint alleges that federal funds have been disbursed under the Act, "with the consent and approval of the [appellees]," and that such funds have been used and will continue to be used to finance "instruction in reading, arithmetic and other subjects and for guidance in religious and sectarian schools" and the "purchase of textbooks and instructional library materials for use in religious and sectarian schools." *Id.* at 87.

Unlike *Flast,* respondents in the instant action have one additional level of taxpayers' status. Not only are they state taxpayers, they are also school district taxpayers. Money is transmitted by the state to the local school district. Part of the funds also come from local school district taxes. The action of the local school board determines the specific expenditure of funds. The Establishment Clause of the First Amendment made applicable to the states by the Fourteenth Amendment to the United States Constitution is equally applicable to action by a school district board of education. *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 637 (1942). In any event, respondents' standing is not lost because the school board makes the ultimate determination as to the expenditure of funds since a school district is merely an instrumentality of the state created for administrative convenience. *Bradley* v. *Milliken,* 44 F.2d 215, 245 (6th Cir. 1973).

Petitioners make the point that respondents do not appear as parents of children involved in the challenged programs. However, the same was true in *Flast.* There, plaintiffs were neither school children nor parents of school children.

It is respectfully submitted that the parties which sought to invoke the Court's jurisdiction in this case did "allege such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely

depends for illumination of difficult constitutional questions." *Duke Power Co.* v. *Carolina Environmental Study Group,* 438 U.S. 59, 72 (1978), quoting *Baker* v. *Carr,* 369 U.S. 186, 204 (1962). Respondents, as both state and local district taxpayers, have in this case also met the requirement of a "personal stake" which, under the decisional law of this Court, must consist of "a distinct and palpable injury. . ." to the plaintiff. *Duke Power Co., supra* at 72, quoting *Warth* v. *Seldin,* 422 U.S. 490, 501 (1975) and "a 'fairly tracable' causal connection between the claimed injury and the challenged conduct," *Duke Power, supra* at 72, quoting *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 261 (1977).

The determination of a plaintiff's standing under *Flast* consists of an evaluation by the court of the nexus between the plaintiff and the cause of action, *Flast* v. *Cohen, supra,* so that it may determine whether the party seeking relief has alleged a personal stake in the resolution of the controversy. *Flast* made it clear that a taxpayer may be a proper party to request adjudication of an issue, so long as he establishes "a logical link between that status and the type of legislative enactment challenged." *Id.* at 102. While incidental expenditures arising from administration of regulatory legislation are sufficient, if a funding program is challenged, as is true in the case at hand, only one further element must be established to demonstrate a taxpayer's standing:

> Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limits imposed upon the exercise of the

> congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, §8.

Id. at 102-103.

In Flast the precise nature of the constitutional infringement was a violation of the Establishment Clause of the First Amendment as is the case here. Thus, the respondents have standing to challenge this school district operated (and local and state funded) program because they allege it infringes on the specific prohibition against the establishment of religion contained in the First Amendment to the Constitution, applied to the states through the Due Process Clause of the Fourteenth Amendment, *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Gitlow* v. *New York,* 268 U.S. 652 (1925).

Respondents' First Amendment allegations contained in their complaint concern one of the two religion clauses — the Establishment Clause, which they have clearly stated in the complaint and affidavits.Thus, respondents have established the identical nexus which existed in *Flast* between the individual plaintiffs and the cause of action. The local school district has budgeted expense for lease payments, for teachers' salaries, and other expenses of the Shared Time program and has annually appropriated funds to cover these budgeted expenses. Likewise, the Michigan legislature has authorized local school districts under MSA 15.41282; MCLA 380.1282 to undertake Shared Time programs and has authorized the payment of state school aid funds to local school districts for part-time public school pupils receiving Shared Time instruction on leased premises. MCLA 388.1601 *et seq.;* MSA 15.1919 (901) *et seq.* Also MCLA 380.331; MSA 15.4331.

The Michigan legislature has annually appropriated funds to cover applications made by individual school dis-

tricts for state school aid. All of the requirements of *Flast* are met, as the actions of the state government and its subdivision are clearly an exercise of the taxing and spending power. The limitation asserted by respondents upon that taxing and spending power is the specific constitutional limitation imposed by the Establishmemt Clause of the First Amendment.

Finally, it might be observed that respondents are not "roam[ing] the country in search of governmental wrongdoing." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, supra* at 487. Rather, respondents are state and local taxpayers residing within the school district in which the alleged constitutional violations are occurring. If they do not have standing, who does?

Recently this Court decided an important establishment case on its merits without finding lack of jurisdiction on the basis of standing. In *Lynch* v. *Donnelly,* 104 S.Ct. 1355 (March 5, 1984), the Court went right to the heart of the constitutional issues raised in that action.

When that case was before the district court, the defendants challenged the standing of the plaintiffs. The district court, however, turned aside the standing challenge, finding that the plaintiffs did in fact have standing. In doing so it noted "even before *Flast* v. *Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), recognized the standing of federal taxpayers to challenge governmental expenditures on Establishment Clause grounds, municipal taxpayer standing had been permitted in this area . . . (citations omitted). Thus, there is litle doubt that Kriebel, Goodwin and Frazier who pay taxes to Pawtucket, can challenge the city's maintenance of the creche."*Donnelly* v. *Lynch,* 525 F.Supp. 1150, 1162 (D. R.I. 1981).

A footnote to the district court's opinion, which is similar to the record in this case, indicates that "these plaintiffs submitted affidavits stating that they are now and have been during the time period relevant in this suit taxpaying residents of Pawtucket." Plaintiffs who are state and local taxpayers residing in the affected school district, therefore, have alleged in their complaint sufficient allegations to meet the standing requirements of this Court.

II.

THE "SHARED TIME" EDUCATIONAL PROGRAM PROVIDED BY A PUBLIC SCHOOL DISTRICT FOR STUDENTS ENROLLED IN CHURCH SCHOOLS AND OPERATING ON THE CHURCH SCHOOL PREMISES USING TEACHERS PAID BY TAX MONEY IS UNCONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE.

The location of the site for the administration of the program here under attack requires that the program be found to be uncosntitutional under the Establishment Clause of the First Amendment made applicable to the states and to their poltiical subdivisions by reason of the Fourteenth Amendment.

This Court in *Lynch* v. *Donnelly, supra,* reaffirmed by name many of its prior decisions, including *Lemon* v. *Kurtzman, supra; McCollum* v. *Board of Education, supra; Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756 (1973); *Meek* v. *Pittenger,* 421 U.S. 349 (1975). These decisions, if followed, require this Court to affirm the decisions below.

This Court in *Lynch* discussed the Court's previous differentiation between the on-premises, shared-time pro-

gram found unconstitutional in *McCollum* v. *Board of Education, supra,* and the off-premises, released-time program in *Zorach* v. *Clauson,* 343 U.S. 306 (1952). *Id.* at 1363-1364. Thus, the site of a given program still has constitutional relevance. See *Wolman* v. *Walter,* 433 U.S. 229, 242-248 (1977).

Perhaps most significantly, as it relates to the instant case, this Court in *Lynch* found that there was no administrative entanglement between religion and state. *Id.* at 1364. In *Lynch,* the Court specifically found "there is nothing here, of course, like the 'comprehensive, discriminating, and continuing state surveillance' or the 'enduring entanglement' present in *Lemon.*" *Id.* at 1364. The facts in the instant case demonstrate that under the decisional law of this Court such monitoring is required.

Relevant is the concurring opinion of Justice O'Connor in *Lynch* v. *Donnelly, supra,* wherein the importance of the entanglement prong of the three-part Establishment Clause test is discussed. The concurring opinion indicated that government can run afoul of the Establishment Clause by "excessive entanglement with religious institutions, which may interfere with the independence of the institutions, giving the institutions access to government or governmental power not fully shared by nonadherence of the religion, and foster the operation of political constituencies defined along religious lines. *Id.* at 1366.

In this case there is evidence of state interference with the autonomy of the church as it controls the site and the providing of services on the premises of the nonpublic school. See GRPS Ex.11 (J.A. 214, ¶4). The areas of the private school to be used are to be "stripped of all religious material or symbols." See also (J.A. 62, ¶24).

The evidence also indicates that some churches operating church schools have refused the services provided by the School District of the City of Grand Rapids because they do not want such government intrusion. According to petitioners,

> the Grand Rapids Baptist Academy is not and will not participate in the program because it will lose control over the identity and religious background of those teachers who would or may be selected by the GRPS to teach in the program. Further, the Academy believes that it is not in their best interest as a Baptist school to have GRPS teachers in their building who do not meet the strict standard of faith which applies to all teachers employed by the Academy, which requires that such staff members have a spiritual commitment to Jesus Christ as their Savior.

(J.A. 373-374, ¶295).

Thus, parents of nonpublic school children who attend those church schools participating in the program have access to governmental assistance which is not available to parents of students attending nonparticipating church-operated schools such as the Grand Rapids Baptist Academy. This is so because in practice the child attending a nonpublic school in Grand Rapids can only receive benefits if the government and the church-operated school come to an agreement and the church agrees to lease a portion of its facilities to the school district and permit the school district to assume control over part of its property, its school day, and its students during part of the time that they are under the control of the public school.

In *Lynch* v. *Donnelly, supra* at 1364, the Court referred to *Larkin* v. *Grendel's Den,* 459 U.S. 116 (1982), where an

important governmental power — licensing veto authority — has been vested in churches. This Court held that giving such authority to a church was unconstitutional. The Grand Rapids program, in essence, grants to churches operating schools veto power over a child's receipt of benefits. If a church school decides that it will not permit the program to operate on its premises or take down its religious symbols or otherwise give up part of its autonomous control over the facilities and the students, it is the needy student who loses the service.

The Court in *Lynch, supra* at 1358, began its analysis by noting that "the purpose of the Establishment and Free Exercise Clauses of the First Amendment is 'to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the others.' *Lemon* v. *Kurtzman,* 403 U.S. 602, 614." Although the Court in *Lemon* also acknowledged that total separation is not possible in an absolute sense, this Court has never abandoned its awareness that institutional entanglement is an evil with which the Establishment Clause of the First Amendment is concerned.

In *Mueller* v. *Allen,* 103 S.Ct. 3062, 3071 (June 29, 1983), this Court applied the third part of the *Lemon* inquiry — the excessive entanglement prohibiton — to determine whether there was "comprehensive, discriminating, and continuing state surveillance," *id.* at 3071, and found none to exist because the only requirement in any way implicating the excessive entanglement prong was that of state officials deciding to allow or disallow deductions taken from "institutional books and materials used in the teaching of religious tenets, doctrines, or worship." *Id.* at 3071. This Court found that making such decisions did not differ substantially from making the types of decisions ap-

proved in such earlier opinions as *Board of Education* v. *Allen,* 392 U.S. 236 (1968), where this Court upheld the loan of secular textbooks to parents or children attending nonpublic schools.

However, as the Court previously noted in *Lemon* v. *Kurtzman, supra* at 619, "[u]nlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. Those prophylactic contacts will involve excessive and enduring entanglement between church and state."

In *Meek* v. *Pittenger, supra* at 369, this Court spoke to this issue, as it applied to an auxiliary services case, and opined that:

> We need not decide whether substantial state expenditures to enrich the curricula of church-related elementary and secondary schools, like the expenditure of state funds to support the basic education program of those schools, *necessarily result in direct and substantial advancement of religious activity.* For this decisions of this Court make clear that the district court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strict nonideological posture is maintained.

In *Wolman* v. *Walters, supra* at 247, this Court observed that [t]he danger existed there, [in *Meek*] not because the public employee was likely to subvert his task to the service of religion, but rather because of the pressures of the environment might alter his behavior from the normal course."

The remarkable perception of this Court in *Wolman* v. *Walter* is supported by Monsignor John J. Leibrecht in a thought-provoking article which he wrote at the time he was assistant superintendent of schools in the Archdiocese of St. Louis. He states:

> Frequently enough when one speaks about the distinctive qualities of the Catholic school, the word "atmosphere" comes up. The school has some sort of intangible thing called atmosphere. It comes not from the physical facilities or the religion classes, or the students – at least not chiefly. It comes, for good or for bad, from the faculty. The most distinctive and valuable thing the Catholic school can offer to parents is its faculty – even more important than the religion classes themselves to the totality of curriculum.
>
> The faculty is a Christian community involved in the experience of together living Christian community life. The student comes to the Catholic school not to be taught *about* Christian living, but to *experience* Christian living. The student is not merely prepared for further Christian living. He gets caught up now in Christian living. . . . When the student comes into the Catholic school he somehow becomes involved in the faculty's own Christian community life. Just as a child, for good or for bad, gets caught up in the life of the family to which he pays an extended visit, so the student is influenced by the faculty's Christian community life. The atmosphere of the Catholic school, no less real because it is intangible is that spirit created by the common Christian life conscientiously lived by the faculty and participated in by the students. The school is then truly the extension of the parents and their hopes for their children.

Leibrecht, "Thoughts on the Catholic School," *The Catholic Educator,* May 1966, p. 27 at 28, 33.

To permit the child benefit theory to be extended to permit public funds to be used to place "teachers in parochial schools" would place form over substance. In fact, there would be no logical stopping point. In both instances services are directly related to the advancing of the religious educational missions of the schools.

Petitioners suggested that the Grand Rapids program is operated free from the no religious symbol requirement of the program. However, there is testimony that at least one shared-time reading teacher in her circuit of reading assignments has had to cover up religious symbols. When asked what kind of reaction that provoked from her students, she surmised that they thought that she was "an Atheist" or "a strange." (J.A. 428, ¶97). In addition, there is also evidence that at one parochial school a public address system with speakers in the hallway and classrooms has been used to pipe morning prayer into the shared-time classroom. (J.A. 428, ¶98).

Petitioners have sought to distinguish this case from *Meek* v. *Pittenger* by suggesting that there is a six-year operational history of the challenged activities on leased premises (Joint Brief of Petitioners, p. 26). It should be noted, however, that this lawsuit was filed on August 4, 1980, thus a great portion of those six years of operation has been under the threat of an adverse determination in this case and the watchful eye of the plaintiffs in this action. Once this lawsuit is terminated, the limited monitoring provided by this court action will be eliminated. With-

out the "comprehensive, discriminating, and continuing state [school district surveillance] referred to in *Lynch* v. *Donnelly, supra* at 1364, there can be no assurance that the program will be conducted in a religiously-neutral environment. Plaintiffs do not believe that the removal of religious symbols in one room of a religious institution dedicated to the religious mission of its sponsoring church creates a nonreligious or religiously-neutral environment.

In *Wheeler* v. *Barrera,* 417 U.S. 402 (1974), this Court considered two issues: (1) whether Title I of the Elementary and Secondary School Act of 1965 (the legislative provision under attack in *Flast* v. *Cohen, supra*) required the assignment of publicly employed teachers to provide remedial instruction during regular school hours on the premises of private schools attended by Title I eligible students and (2) whether the requirement, if it exists, contravenes the First Amendment. Significantly, this Court concluded that it could not reach a decision on either issue at that particular stage of the proceedings. Nevertheless, Justice Powell, in a concurring opinion, indicated that he "would have serious misgivings about the constitutionality of a statute that required the utilization of public school teachers in sectarian schools." *Id.* at 428.

Perhaps most relevant for this Court's consideration is the Court of Appeals' wise observation that

> [w]e should also point out that while the three churches involved at this time in this program have reputations for social responsibility, the same sort of program, if legitimatized by ultimate legal authority and spread nationwide, will face applications for similar assistance by dozens if not hundreds of religious organizations. Many less orthodox religious sects would be equally en-

> titled to public funds from these programs, assuming they meet state law standards. Many of them may also act as a result of religious zeal and economic need with much less responsibility than the district judge and this court have assumed was true concerning these defendants. Extensive monitoring would be required to maintain even a surface appearance of separation of church and state.

Americans United for Separation of Church and State v. *The School District of the City of Grand Rapids,* 718 F.2d 1389, 1407-1408 (6th Cir. 1983).

CONCLUSION

For the reasons set forth herein, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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